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No.

In the
Supreme Court of the United States

APNA GHAR, INC.,

Petitioner,

v.

ROBERT JOHNSON,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is Title VII's definition of "employer", 42 U.S.C. § 2000e(b), a limitation on the federal courts' subject matter jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1343(a), and/or 42 U.S.C. § 2000e-5(f)(3), or an element of the plaintiff's claim?

2. If Title VII's definition of "employer", 42 U.S.C. § 2000e(b), is a limitation on the federal courts' subject matter jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1343(a), and/or 42 U.S.C. § 2000e-5(f)(3), what effect on interstate commerce must a plaintiff establish at the pleading stage when the defendant attacks the District Court's subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1), by challenging the accuracy of the jurisdictional facts alleged?

3. Can Congress regulate the employment activities of a local, noncommercial, not-for-profit, social services shelter through Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.*?

STATEMENT PURSUANT TO RULE 29.6

Apna Ghar, Inc., an Illinois corporation, has no parent corporation and no publicly traded stock.

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PETITION FOR WRIT OF CERTIORARI

Apna Ghar, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 330 F.3d 999, and is reproduced in the Appendix ("App.") at pages A1-A10. The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois is not reported and is reproduced in the Appendix. App. at A11-A13.

STATEMENT OF JURISDICTION

The Court of Appeals for the Seventh Circuit entered its final judgment on June 4, 2003. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 3

"The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

U.S. Const. art. III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made,

under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343(a)

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or

usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

29 U.S.C. § 152(7)

The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

42 U.S.C. § 2000e(b)

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian Tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. § 2000e(h)

The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.], and further includes any governmental industry, business, or activity.

42 U.S.C. § 2000e-2(a)

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-5(f)(3)

Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial

district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

STATEMENT OF THE CASE

Apna Ghar, Inc. ("Apna Ghar") is an Illinois not-for-profit corporation located in Chicago. A local entity, it provides transitional shelter and walk-in social services to victims of domestic violence who are primarily Asian women and children. One of the services it provides is assistance with legal matters. In March 1999, Apna Ghar placed a "help wanted" advertisement in the *Chicago Reader*, a newspaper distributed in Chicago and neighboring suburbs (including northwest Indiana), advertising a "legal advocate" position. Robert Johnson ("Johnson"), a resident of Chicago, Illinois, submitted an application and resume. Apna Ghar reviewed Johnson's resume but declined to interview him because he is male and it wanted a female advocate. Johnson filed a timely charge of discrimination with the Equal Employment Opportunity Commission, which determined there was reasonable cause to believe Apna Ghar discriminated against Johnson because of his gender and issued Johnson a right-to-sue letter. App. at A1-A2.

Johnson filed suit in federal court alleging discrimination in violation of Title VII of the Civil Rights Act of 1964 as

amended, 42 U.S.C. § 2000e *et seq.* Johnson invoked the District Court's subject matter jurisdiction under 42 U.S.C. § 2000e-5(f)(3). Apna Ghar filed a Rule 12(b)(1) motion to dismiss, arguing that the District Court lacked subject matter jurisdiction because it was not an "employer" within the meaning of Title VII. Relying on *United States v. Morrison*, 529 U.S. 598 (2000), the District Court determined that "it would impermissibly stretch the Commerce Clause to read that provision (which is the source of power for the enactment of Title VII) as extending to . . . Apna Ghar['s] activity." The District Court, therefore, granted Apna Ghar's motion to dismiss, and Johnson appealed to the Seventh Circuit. App. at A11-A13.

The Seventh Circuit reversed on two grounds. First, relying on Circuit precedent holding that Title VII's definition of an "employer" is an element of the plaintiff's claim and not a matter of subject matter jurisdiction, the Court held that Johnson's claim arose under the laws of the United States and "no more is necessary for subject-matter jurisdiction" under 28 U.S.C. § 1331. Second, the Court found that Title VII's "affects commerce" threshold is "very low" and that Apna Ghar's activities are matters which "affect," "interrupt," or "promote interstate commerce." Thus, the Seventh Court held that the District Court erred in dismissing Johnson's claim under either Rule 12(b)(1) and 12(b)(6). App. at A3-A10.

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S HOLDING, THAT TITLE VII'S DEFINITION OF AN "EMPLOYER" IS AN ELEMENT OF THE PLAINTIFF'S CLAIM AND NOT A MATTER OF SUBJECT MATTER JURISDICTION, CONFLICTS DIRECTLY WITH THE MAJORITY OF UNITED STATES COURTS OF APPEAL.

The Seventh Circuit's decision relies on Circuit precedent holding that Title VII's definition of an "employer" is an element of the plaintiff's claim and not a matter of subject jurisdiction. App. at A3-A4. The Second Circuit has also held that Title VII's definition of an "employer" is not a jurisdictional issue. *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358 (2d Cir.2000). However, the Seventh and Second Circuits' holdings directly conflict with the holdings of the Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits. *Ferroni v. Teamsters, Chauffeurs & Warehousemen Local No. 222*, 297 F.3d 1146 (10th Cir.2002); *Daggitt v. United Food and Commercial Workers Int'l Union, Local 304A*, 245 F.3d 981 (8th Cir.2001); *Greenlees v. Eidenmuller Enters., Inc.*, 32 F.3d 197 (5th Cir.1994); *Childs v. Local 18, IBEW*, 719 F.2d 1379 (9th Cir.1988); *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir.1983); *Woodward v. Virginia Bd. of Bar Exam'rs*, 598 F.2d 1345 (4th Cir.1979). On somewhat middle ground is the Eleventh Circuit, which has held that the status of an "employer" under Title VII implicates both subject matter jurisdiction and the underlying merits. *Morrison v. Amway Corp.*, 323 F.3d 920 (11th Cir.2003). There is no basis for the minority rule.

In fact, the Seventh Circuit has acknowledged that where an employer does not meet Title VII's definition of "employer," no case or controversy arises under Title VII and, therefore, Article III courts lack federal question jurisdiction. *E.E.O.C. v. Chicago Club*, 86 F.3d 1423, 1428

(7th Cir.1996). The Seventh Circuit finds this fact "unacceptable," because it "suggests that a plaintiff must prove, as a matter of jurisdiction under § 1331," that the defendant is in fact a Title VII "employer." *Id.* Thus, it ignores it and simply assumes that a district court does not lack subject matter jurisdiction in cases where the defendant fails to meet Title VII's definition of "employer" because the claim arises under the laws of the United States and, therefore, "no more is necessary for subject-matter jurisdiction" under 28 U.S.C. § 1331. *See* App. at A4; *see also Komorowski v. Townline Mini-Mart and Restaurant*, 162 F.3d 962, 964 (7th Cir.1998); *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435, 438 n.1 (7th Cir.1996).

The Second Circuit, in *Da Silva*, 229 F.3d 358, also has addressed whether Title VII's definition of "employer" is a matter of subject matter jurisdiction or an element of the plaintiff's case. The *Da Silva* Court reasoned vaguely that "the institutional requirements of a judicial system weigh in favor of narrowing the number of facts or circumstances that determine subject matter jurisdiction." *Id.* at 365. Then, in a bit of semantic legerdemain, the Court noted that Title VII's jurisdictional statute, 42 U.S.C. § 2000e-5(f)(3), requires only that an action be "brought under" Title VII, "a standard linguistically similar to, and arguably less exacting than, the 'arising under' formulation of section 1331." *Da Silva*, 229 F.3d at 365. Thus, based upon the "limited . . . issues that should determine subject matter jurisdiction and . . . the wording of Title VII's jurisdictional statute," *Da Silva* held that the definition of a Title VII employer is not a jurisdictional issue. *Id.* at 366.

The Eleventh Circuit, in *Amway*, 323 F.3d 920, resolved an intra-circuit split concerning whether Title VII's definition of "employer" implicates subject matter jurisdiction or the underlying merits. *Compare Garcia v.*

Copenhaver, Bell & Assocs., 104 F.3d 1256 (11th Cir.1997) (holding that questions of "employer" status implicate both jurisdiction and the underlying merits and, therefore, cannot be resolved under Rule 12(b)(1)) *with Scarfo v. Ginsberg*, 175 F.3d 957 (11th Cir.1999) (holding that the defendant's status as an "employer" under Title VII was jurisdictional and could be reviewed under Rule 12(b)(1)). To resolve the intra-circuit split, the *Amway* Court, in what amounts to a coin flip, applied the "earliest case" rule and announced that *Garcia* is the law of the Circuit. Significantly, the Court admitted that "it is not for us to decide whether *Garcia should* be the law of this Circuit. That question can only be decided by the Supreme Court or this Court sitting en banc." *Amway*, 323 F.3d at 929 (emphasis in original).

Conversely, the Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits have ruled forthrightly that the defendant's status as a Title VII employer is a prerequisite to subject matter jurisdiction. *Ferroni*, 297 F.3d 1146 (the defendant did not meet Title VII's definition of employer, therefore, the district court did not have subject matter jurisdiction over the claim); *Daggitt*, 245 F.3d 981 (affirming the district court's determination that it had subject matter jurisdiction over the plaintiff's Title VII claim as the defendant was a Title VII employer); *Greenlees*, 32 F.3d 197 (affirming the district court's dismissal for lack of subject matter jurisdiction because the defendant was not a Title VII employer); *Childs*, 719 F.2d 1379 (affirming the district court's decision that it lacked subject matter jurisdiction because the defendant did not meet Title VII's definition of employer); *Armbruster*, 711 F.2d 1332 (framing the issue as whether the plaintiffs were barred from bringing their claim in federal court by Title VII's jurisdictional requirement); *Woodward*, 598 F.2d 1345 (affirming the district court's decision that it lacked subject matter

jurisdiction because the Board of Bar Examiners was not a Title VII employer).

This Court should grant this petition to resolve the conflict among the circuits and should do so by sanctioning the majority, and correct, rule.

II.

THE SEVENTH CIRCUIT'S DECISION IMPERMISSIBLY EXTENDS JUDICIAL AUTHORITY UNDER TITLE VII IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Federal courts are courts of limited jurisdiction, *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994), and the extent of federal judicial authority is delineated in Article III, section 2, clause 1 of the Constitution. *Insurance Corp. of Ireland, Ltd. v. Compagnie de Bauxites de Guinee*, 456 U.S. 694, 701 (1982). Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. *Id.* Thus, the federal courts possess only that power authorized by Article III of the Constitution and the statutes enacted by Congress, *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986), and that power cannot be expanded by judicial decree, *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17-18 (1951). *See also Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941) (federal courts must confine their subject matter jurisdiction to the precise limits which the applicable statute has defined).

Outside the context of Title VII, this Court has held that the federal courts' subject matter jurisdiction can be limited by certain statutory requirements. For instance, in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), this Court addressed whether

§ 505 of the Federal Water Pollution Control Act, 33 U.S.C. § 1365(a), confers subject matter jurisdiction over citizen suits for wholly past violations. The Court interpreted the phrase "alleged to be in violation" in section 505 as imposing a jurisdictional requirement that "citizen-plaintiff's allege a state of either continuous or intermittent violation that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney*, 484 U.S. at 57. Consistent with this requirement, this Court held that jurisdiction will not lie where a plaintiff alleges claims for "wholly past" violations, *id.* at 57-58; however, § 505 does "confer jurisdiction over citizen suits when the citizen-plaintiffs make a good-faith allegation of continuous or intermittent violation," *id.* at 64.

Similarly, in *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980), this Court addressed the interstate commerce requirement of the Sherman Act. There, the plaintiffs filed a complaint in District Court alleging that real estate brokers had engaged in a price-fixing conspiracy in violation of the Sherman Act. After considering briefs, deposition testimony, documents, and oral argument on the issue, the District Court dismissed the complaint for failure to establish the interstate commerce component of Sherman Act jurisdiction. *Id.* The Fifth Circuit affirmed. Although this Court vacated the decision below, holding that, "[o]n the record thus far made, it cannot be said that there is an insufficient basis for petitioners to proceed at trial to establish Sherman Act jurisdiction," *id.* at 245, it also stated that jurisdiction under the Sherman Act may not be invoked "unless the relevant aspect of interstate commerce is identified; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce." *Id.* at 242. In this vein, this Court continued: "To establish the jurisdictional element of a Sherman Act violation it would

be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity." *Id.*

In the context of Title VII, and contrary to relevant decisions of this Court concerning the federal courts' limited jurisdiction, the Seventh Circuit has admittedly asserted subject matter jurisdiction over cases where the defendant employer does not meet Title VII's definition of employer and, therefore, where no case or controversy exists between the parties. *Chicago Club*, 86 F.3d at 1428. Consequently, the Seventh Circuit is asserting federal judicial authority over subject matter beyond that authorized by Article III of the Constitution and Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.* *Compare* App. at A3-A4 ("a district court does not lack subject matter jurisdiction in cases where the defendant fails to meet the statutory definition of 'employer.'") (internal quotations and citations omitted) *with Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 200, 205 (1997) (an employer is "subject to Title VII . . . only if, at the time of the alleged [discrimination], it met the statutory definition of employer.").

This Court should grant this petition to clarify the extent of the judicial authority of federal courts under Title VII.

III.

THE SEVENTH CIRCUIT'S DECISION IMPROPERLY SANCTIONS CONGRESSIONAL REGULATORY AUTHORITY OVER LOCAL, NON-PROFIT ORGANIZATIONS UNDER TITLE VII IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The Constitution delegates to Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. As "[c]omprehensive as the word 'among' is, it may be very properly restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or subject of the sentence, must be the exclusively internal commerce of a State." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824). The issue, briefed by the parties below but sidestepped by the Seventh Circuit, is whether Title VII may constitutionally reach employment activities at a local, noncommercial social services shelter.

United States v. Lopez, 514 U.S. 549 (1995) and *Morrison*, 529 U.S. 598, provide the starting point for analyzing an as-applied constitutional challenge to a statute based upon Commerce Clause. *United States v. McCoy*, 323 F.3d 1114 (9th Cir.2003) (applying *Morrison* to an as-applied constitutional challenge). *Lopez* established that the Commerce Clause allows regulation of three broad categories of activity: the channels of interstate commerce; the instrumentalities of interstate commerce, or persons or things in interstate commerce; and those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59. With respect to the third category, the category implicated here, this Court emphasized that the "proper test requires an analysis of whether

the regulated activity 'substantially affects' interstate commerce." *Id.* at 559.

Morrison established what is now the controlling four-factor test for determining whether a regulated activity "substantially affects" interstate commerce. These factors are: (1) the economic nature of the regulated activity; (2) a jurisdictional element limiting the reach of the law to a discrete set of activities that additionally has an explicit connection with or effect on interstate commerce; (3) express congressional findings regarding the effects upon interstate commerce of the activity in question; and (4) the link between the regulated activity and interstate commerce. *Morrison*, 529 U.S. at 609-13.

The first *Morrison* consideration concerns the economic or commercial nature of the regulated activity. *Morrison*, 529 U.S. at 610. Apna Ghar is a not-for-profit, walk-in, local domestic violence shelter for abused women and children in Chicago. Unlike Filburn's home-grown wheat that competed in commerce, *Wickard v. Filburn*, 317 U.S. 111 (1942), Apna Ghar's activities are not commercial or economic in nature—they are charitable. If its activities can be considered economic or commercial, all local, non-profit organizations that make hiring decisions would fall within Title VII's definition of "employer."

The second *Morrison* consideration is whether the statute has an "express jurisdictional element" that restricts its application to activities that have an "explicit connection with or effect on interstate commerce." *Morrison*, 529 U.S. at 611-12; *Lopez*, 514 U.S. at 561 (the purpose of a jurisdictional element is to ensure, through a case-by-case inquiry, that the defendant's activity affects interstate commerce). Unlike the statutes in *Lopez* and *Morrison*, Title VII contains an express jurisdictional element; namely, the definition of "employer." The Seventh Circuit, however, relying on *Wickard*, 317 U.S. 111, set the

"affecting commerce" hurdle "very low," and concluded that Apna Ghar satisfies this low threshold because:

> Apna Ghar is a not-for-profit corporation that employs over 20 employees and provides a variety of worthwhile services to its clientele. In the process, it solicits and receives employment applications from out-of-state individuals, maintains telephone service for both in-state and toll-free out-of-state contact, works with out-of-state universities, performs extensive counseling services, accompanies clients to assist with negotiations, provides legal services and transportation services, and provides referrals for shelters, legal services, medical agencies, and housing organizations. In addition, Apna Ghar receives financial and in-kind support from a variety of individuals and organizations, including some located outside Illinois, and these contributions necessarily impact the interstate flow of such aid to other similarly deserving organizations. Moreover, Apna Ghar provides residential and child support services, and to do so it purchases or receives goods that were manufactured or transported in interstate commerce at some point during their life.

App. at A8-A9.

Under the Seventh Circuit's reasoning, any entity that processes job applications, uses telephones, and performs daily business functions "affects commerce" and is, therefore, a Title VII employer. Expressly dismissing the applicability of *Morrison*, App. at A6, the Seventh Circuit ignored *Morrison*'s admonition that the connection between the activity regulated and the jurisdictional element may be so attenuated that there may be no substantial effect on interstate commerce. *Morrison*, 529 U.S. at 615. Under the circumstances here, the application of Title VII "would

impermissibly stretch the Commerce Clause to read that provision . . . as extending to . . . Apna Ghar" or to others similarly situated. *See* App. at A13.

The third consideration under the *Morrison* analysis is whether legislative history contains express congressional findings regarding the effects upon interstate commerce of employment practices at local social service shelters. *Morrison*, 529 U.S. at 612. While "Congress normally is not required to make formal findings as to the substantial burden that an activity has on interstate commerce," *Lopez*, 514 U.S. at 562, the existence of such findings may enable the courts "to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce." *Id.* at 563. The legislative history of Title VII of the Civil Rights Act of 1964, and its amendments, reveals neither Congressional findings regarding the effects upon interstate commerce of employment practices at wholly intrastate social service shelters, nor Congress' intent to regulate the employment practices at local social service shelters.

The final consideration under *Morrison* is whether the link between the regulated activity and interstate commerce is direct or attenuated. *Morrison*, 529 U.S. at 612-13. Where state power is preeminent, national authority must be limited to those areas in which interstate commerce is truly affected. *Cf. Lopez*, 514 U.S. at 561 n.3 (discussing federal-state comity). Historically, the States have traditionally regulated corporations and intrastate employment discrimination. *See, e.g., CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89 (1987) ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations."); *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (Congress has explicitly disclaimed any intent categorically to pre-empt state law or to "occupy the field" of employment discrimination law.

To allow Congress to regulate the employment activities at a local social services shelter on a theory of its aggregate effect on the national economy would give Congress a free hand to regulate any activity, since, in the modern world, virtually all social services shelters have at least some attenuated impact on the national economy. *Cf. Morrison*, 529 U.S. at 615. The application of Title VII to Apna Ghar in the circumstances present here (or to other entities in similar circumstances) does not show a relationship between the regulated activity and interstate commerce—and certainly not the type of direct or substantial, or even *de minimus*, relationship necessary to justify the invocation by Congress of its Commerce power in order to regulate employment activities at a local social services shelter.

The Seventh Circuit found that *Morrison* and *Lopez* do not apply. App. at A6. This Court should grant this petition to clarify the applicability of the analysis set forth in *Morrison* and *Lopez* to an as-applied constitutional challenge such as this one.

CONCLUSION

For all the reasons stated above, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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DATED: SEPTEMBER 2, 2003

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 01-2015

ROBERT JOHNSON,

Plaintiff-Appellant,

v.

APNA GHAR, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 00 CV 7752—**Milton I. Shadur**, *Judge*.

ARGUED DECEMBER 5, 2002—DECIDED JUNE 4, 2003

Before BAUER, DIANE P. WOOD, and WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*. Robert Johnson sued Apna Ghar, Inc. for discrimination in employment, in violation of Title VII of the Civil Rights Act, asserting that Apna Ghar rejected his job application because he is male. In granting Apna Ghar's motion to dismiss for lack of subject matter jurisdiction, the district court relied on *United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995), and found that it would be an unconstitutional exercise of the commerce clause to subject Apna Ghar to Title VII. Because we find *Morrison*

and *Lopez* inapplicable, and that Apna Ghar is an employer whose business affects commerce, we reverse.

I. BACKGROUND

Apna Ghar is an Illinois not-for-profit organization that provides transitional shelter and walk-in social services to victims of domestic violence who are primarily Asian women and children. One of the services it provides is assistance with legal matters. In March 1999, Apna Ghar placed a "help wanted" advertisement in the *Chicago Reader*, a newspaper distributed in Chicago and neighboring suburbs (including some in nearby Indiana), advertising a "legal advocate" position that paid up to $27,000. Robert Johnson submitted an application and resume; Apna Ghar reviewed his resume and informed him it was not going to interview or hire him because he is male and it "preferred a female legal advocate."

Johnson filed a timely charge of discrimination with the Equal Employment Opportunity Commission, which determined there was reasonable cause to believe Apna Ghar discriminated against Johnson because of his gender, attempted to conciliate, and ultimately issued Johnson a right to sue letter. Johnson filed suit in federal court alleging discrimination in violation of Title VII. Apna Ghar filed a Rule 12(b)(1) motion to dismiss, claiming that subject matter jurisdiction was lacking because it was not an "employer" within the meaning of Title VII. The district court determined that "it would impermissibly stretch the Commerce Clause to read that provision (which is the source of power for the enactment of Title VII) as extending to . . . Apna Ghar['s] activity." It therefore granted Apna Ghar's motion to dismiss, and Johnson now appeals.

II. ANALYSIS

We review de novo a district court's dismissal under Rule 12(b)(1). *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554 (7th Cir. 1999); *see also Selbe v. United States*, 130 F.3d 1265, 1266 (7th Cir. 1997). "When reviewing a dismissal for lack of subject matter jurisdiction, we note that a district court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff." *Long*, 182 F.3d at 554 (citing *Rueth v. United States Envtl. Prot. Agency*, 13 F.3d 227, 229 (7th Cir. 1993)). When considering such a motion, "'[t]he district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists.'" *Id.* (quoting *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir. 1993)).

Title VII applies to organizations that are "employers," that is, organizations that are "engaged in an industry affecting commerce." 42 U.S.C. § 2000e(b);[1] *Walters v. Metro. Educ. Enter., Inc.*, 519 U.S. 202, 205 (1997); *Sharpe v. Jefferson Distrib. Co.*, 148 F.3d 676, 677 (7th Cir. 1998). In Title VII cases, this court has held that "a district court does not lack subject matter jurisdiction in cases where

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[1] Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b). A "person" under Title VII "includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers." *Id.* § 2000e(a). Apna Ghar does not challenge that it has more than 15 employees or that it is a "person" for Title VII purposes.

the defendant fails to meet the statutory definition of 'employer.'" *Komorowski v. Townline Mini-Mart & Rest.*, 162 F.3d 962, 964 (7th Cir. 1998) (citing *Sharpe v. Jefferson Distrib. Co.*, 148 F.3d 676, 677 (7th Cir. 1998); *Ost v. W. Suburban Travelers Limo., Inc.*, 88 F.3d 435, 438 n.1 (7th Cir. 1996)). If Johnson presents "a non-frivolous claim under federal law; no more is necessary for subject-matter jurisdiction. A plaintiff's inability to demonstrate that the defendant [is an 'employer'] is just like any other failure to meet a statutory requirement. There is a gulf between defeat on the merits and a lack of jurisdiction." *Sharpe*, 148 F.3d at 677 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 87-93 (1998); *Ost*, 88 F.3d at 438 n.1); *see also Komorowski*, 162 F.3d at 965-66; *Martin v. United Way of Erie County*, 829 F.2d 445, 447 (3d Cir. 1987) ("'[e]lements of a claim that are called jurisdictional because they relate to Congress's jurisdiction remain questions of the merits, and the Supreme Court has made clear that a court may resolve them only in the manner that the court may resolve all other questions of the merits'") (quoting *Kulick v. Pocono Downs Racings Ass'n, Inc.*, 816 F.2d 895, 898 (3d Cir. 1987); *cf.* 2 MOORE'S FEDERAL PRACTICE § 12.30(1) (3d ed. 1997) ("Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief—a merits related determination.").

Because Johnson's claim arises under the laws of the United States and is neither "immaterial and made solely for the purpose of obtaining jurisdiction" nor "wholly insubstantial and frivolous," *Bell v. Hood*, 327 U.S. at 682-83, the district court has federal-question jurisdiction pursuant to 28 U.S.C. § 1331. Dismissal under Rule 12(b)(1) was therefore erroneous. The district court's reasoning, however, suggests that it dismissed Johnson's complaint on the ground that his allegations did not state a claim

cognizable under Title VII. Because the question of whether Apna Ghar is an "employer" for purposes of Title VII has been briefed extensively on appeal by both parties and *amicus*,[2] we proceed to evaluate the district court's resolution of this question.

In dismissing Johnson's complaint, the district court concluded that the "clear teaching of Morrison [529 U.S. 598 (2000)] is that it would impermissibly stretch the commerce clause to read that provision (which is the source of power for the enactment of Title VII) as extending to . . . Apna Ghar['s] activity." The district court, however, misunderstands *Morrison* and *Lopez*, 514 U.S. 549 (1995), which both struck down federal statutes as unconstitutional exercises of Congress's Commerce Clause power. In *Lopez*, the Supreme Court stated that for an activity to be regulated by Congress under the Commerce Clause, it must be an activity that substantially affects interstate commerce. 514 U.S. at 559. The Court found that the activity that the Gun-Free School Zone Act sought to regulate—the possession of a gun in a local school zone—is not an economic activity that might, through repetition elsewhere, have a substantial effect on interstate commerce. *Id.* at 561. Furthermore, the Court found the Act "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity was regulated. It [could not], therefore, be sustained under [the Court's] cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate,

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[2] The court appointed Jerold Solovy of the law firm Jenner & Block, LLC to file an amicus curiae brief in support of Johnson, who had filed his appeal *pro se*. The court thanks Mr. Solovy, Barry Sullivan, Jacob Corre, John Joyce, and Jenner & Block for their assistance in our consideration of this appeal.

substantially affect interstate commerce." *Id.* The *Morrison* Court then relied on *Lopez* to find that the Violence Against Women Act similarly did not regulate activity that substantially affected interstate commerce. *See Morrison*, 529 U.S. at 609-17.

Unlike the parties in *Lopez* and *Morrison*, Apna Ghar does not contend that Title VII's regulation of employment is an invalid exercise of Congress's commerce power. Rather, Apna Ghar merely contends that it is not an employer within the meaning of the statute because it is not "engaged in an industry affecting commerce." *Morrison* and *Lopez* are therefore inapposite, as they do nothing to disturb the well-settled doctrine that, so long as the regulatory statute bears a substantial relation to commerce, a single entity may be constrained by it despite the entity's arguably minimal impact on interstate commerce. *Lopez*, 514 U.S. at 558 ("'[W]here *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence.'") (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)) (emphasis in original); *Lopez*, 514 U.S. at 560 (citing *Wickard v. Filburn*, 317 U.S. 111, 128 (1942)).[3]

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[3] We previously have rejected similar challenges to other congressional acts that require showing that the defendant's conduct affected interstate commerce. *See United States v. Peterson*, 236 F.3d 848, 851-52 (7th Cir. 2000) ("We have long held that the government need only show some actual, even if *de minimis*, effect, or, where there is no actual effect, a realistic probability of an effect, on interstate commerce to bring robbery within its prosecutorial reach.") (Hobbs Act) (citing *United States v. Bailey*, 227 F.3d 792, 797 (7th Cir. 2000)); *see also United States v. Stillo*, 57 F.3d 553, 558 n.2 ("Nor did the *Lopez* decision undermine this Court's precedents that minimal potential effect

(continued...)

Thus, the narrower question remains whether Apna Ghar is an "employer" for the purposes of Title VII. Under the statute, an "employer" must be "a person engaged in an industry affecting commerce," 42 U.S.C. § 2000e(b). An "industry affecting commerce" is defined as:

> any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

42 U.S.C. § 2000e(h). The Labor-Management-Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.*, in turn, incorporates the definition of "affecting commerce" as that set forth in the Labor Management Relations Act (LMRA) and the Railway Labor Act, 29 U.S.C. § 402. The LMRA defines "affecting commerce" to mean "in commerce or burdening or obstructing commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." 29 U.S.C. § 152(7).

When the labor law definition of "affecting commerce" was incorporated into Title VII, "the term 'affecting commerce' had been interpreted as vesting in the National Labor Relations Board 'the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.'" *Martin*, 829 F.2d at 448 (quoting *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963)). Similarly, in *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643 (1944),

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[3] (...continued)
on commerce is all that need be proven. . . .") (Hobbs Act).

the Court stated that, "when [Congress] wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but also matters which 'affect', 'interrupt', or 'promote' interstate commerce." *Id.* at 647 (citations to statutes omitted). Indeed, courts have found activity to affect commerce in situations where a defendant merely used items that at some point in time moved through interstate commerce, *see United States v. Dye Constr. Co.*, 510 F.2d 78 (10th Cir. 1975) (defendants purchased trucks and insurance policies produced by out-of-state sources), or engaged in arguably local activity that would affect the dynamics of an interstate market, *see Wickard v. Filburn*, 317 U.S. 111 (1942) (farmer's production of wheat for home consumption). Thus, the "affects commerce" hurdle is very low.

Apna Ghar satisfies this low threshold of "affecting commerce." As indicated above, Apna Ghar is a not-for-profit corporation that employs over 20 employees and provides a variety of worthwhile services to its clientele.[4] In the process, it solicits and receives employment ap-

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[4] Apna Ghar's not-for-profit status does not alter its coverage by Title VII. "Although the term 'industry affecting commerce' may suggest a limitation to commercial enterprises, it is clear that Congress intended to cover all activities affecting commerce, to the extent permitted by the Constitution, regardless of whether they are operated for non-profit or charitable purposes." *Martin*, 829 F.2d at 448. It has long been held that such entities may be "employers" engaged in "industry affecting commerce" for purposes of Title VII. *See id.* (non-profit organization); *See also Bryant v. Int'l Sch. Servs., Inc.*, 675 F.2d 562 (3d Cir. 1982) (non-profit organization engaged in placing American teachers in foreign schools was subject to Title VII as an "employer" engaged in an "industry affecting commerce"); *Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973) (non-profit hospital subject to Title VII).

plications from out-of-state individuals, maintains telephone service for both in-state and toll-free out-of-state contact, works with out-of-state universities, performs extensive counseling services, accompanies clients to assist with negotiations, provides legal services and transportation services, and provides referrals for shelters, legal services, medical agencies, and housing organizations. In addition, Apna Ghar receives financial and in-kind support from a variety of individuals and organizations, including some located outside Illinois, and these contributions necessarily impact the interstate flow of such aid to other similarly deserving organizations. Moreover, Apna Ghar provides residential and child support services, and to do so it purchases or receives goods that were manufactured or transported in interstate commerce at some point during their life. Because Apna Ghar's activities, as described above, are "matters which 'affect', 'interrupt', or 'promote' interstate commerce," *Polish Nat'l Alliance*, 322 U.S. at 647, Apna Ghar is engaged in an industry that affects commerce and is properly classified as an "employer" for purposes of Title VII. Dismissal of Johnson's claim was therefore erroneous.

III. CONCLUSION

For the foregoing reasons, the decision of the district court is REVERSED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Robert Johnson,	)	
Plaintiff,	)	
v.	)	
	)	No. 00 C 7752
Apha Ghar, Inc., et al.	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

These days the late great constitutional scholar William Winslow Crosskey must be uneasy in his grave. Even during his lifetime he was a prophet without honor in his own country, for his reasoned views on the meaning of the Constitution were perceived as revolutionary.[1] Since then his scholarship has gone largely without notice, but at least the United States Supreme Court—albeit by an odd route in Professor Crosskey's view—had retained a broad-scope reading of the Commerce Clause that came within haling distance of the complete congressional authority over commerce in the global sense (extending to all gainful commercial activity within the United States) that Professor Crosskey had urged on the basis of strong historical evidence (see Chapters II through XII in Crosskey's *Politics and the Constitution in the History of the United States*).

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[1] This bad pun is wholly intentional: No scholar has ever replicated Professor Crosskey's in-depth study of all existing documents and cases, both backward and forward from the period of the Revolutionary War through and well beyond the adoption of the Constitution and the Bill of Rights, as the springboard for his meticulously developed theses of constitutional interpretation.

But most recently a Supreme Court majority has retreated significantly from what had been viewed as the established reach (already narrowed from the Crosskeyan perspective) of the Commerce Clause. Beginning with *United States v. Lopez*, 514 U.S. 549 (1995) a sharply different reading has emerged, manifested most recently (and most significantly for purposes of this case) in *United States v. Morrison*, 120 S.Ct. 1740 (2000).[2]

This case presents an effort by Robert Johnson ("Johnson") to impose Title VII liability on Apna Ghar, Inc. ("Apna Ghar"). Apna Ghar responds that it is not a Title VII employer because it is not "engaged in an industry affecting commerce" (42 U.S.C. §2000e (b)). In turn Johnson's counsel retorts by pointing to some things said in Apna Ghar's website (*www.apnaqhar.org*), which was supplemented by other documents produced by Apna Ghar during early discovery. And Johnson has attached as Ex. A to his Response to Defendant's Motion To Dismiss what he perceives to be the relevant documents among those produced.

But the problem with Johnson's position is that the very materials on which he seeks to rely show that "Apna Ghar

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[2] It strikes this Court as particularly ironic that such curbs on the power of the national government are aggressively pursued by the organization of lawyers that has dubbed itself the Federalist Society, when it was after all the Federalists in our early constitutional times who were in precisely the opposite corner. That inversion of the meaning of language brings to mind the use of doublespeak in Orwell's 1984— or to look back at an analogy more consonant with the early period in our country's history, the British Army band's playing of "The World Turned Upside Down" to accompany General Cornwallis' surrender to General Washington at Yorktown.

much an intrastate operation—it was not only formed as an Illinois not-for-profit corporation but also has its location here in Chicago. And the clear teaching of *Morrison* (especially 120 S.Ct. at 1752-54) is that it would impermissibly stretch the Commerce Clause to read that provision (which is the source of power for the enactment of Title VII) as extending to such Apna Ghar activity.

That conclusion is not altered a whit by the added fact that Apna Ghar has listed on its website an out-of-state as well as an Illinois hotline telephone number (Ex. A at 3), or the added fact that non-Illinois universities have worked with Apna Ghar (as listed under "Research and Internship Opportunities" on Ex. A at 5), or the added fact that its *donors* include companies that are themselves in interstate commerce (Ex. A at 6), or the added fact that its website also lists a few other organizations that are available to provide related services elsewhere (Ex. A at 13). None of those things, either singly or collectively, brings Apna Ghar into the realm of "an industry affecting commerce" as viewed through the *Morrison*-dictated lens.

This Court is of course duty bound to adhere to *Morrison* and its underlying premise. In those terms it is compelled to, and it does, grant Apna Ghar's motion. This action is indeed dismissed.

Date: March 22, 2001

/s/
Milton I. Shadur
Senior United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Robert Johnson

v. Case Number: 00 C 7752

Apna Ghar, Inc., et al

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that final judgment is entered dismissing this action pursuant to Fed. R. Civ. P. 58.

Michael W. Dobbins, Clerk of Court

/s/
Date: 3/22/2001 Sandy Newland, Deputy Clerk

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, IL 60604

July 21, 2003

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*
Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 01-2015

Robert Johnson, Plaintiff-Appellant, v. Apna Ghar, Incorporated, Defendant-Appellee.)	))))))))	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 00 C 7752 **Milton I. Shadur,** Judge.

Upon consideration of the MOTION TO CLARIFY OPINION, filed on June 24, 2003, by the pro se appellant,

IT IS ORDERED that the motion is GRANTED. The opinion of this court, issued on June 4, 2003, is AMENDED as follows: On page 9, the final sentence of the opinion is amended to read:

For the foregoing reasons, the decision of the district court is REVERSED and REMANDED for further proceedings consistent with this opinion.

Supreme Court, U.S.
FILED
OCT 9 - 2003
OFFICE OF THE CLERK

(2)

No. 03-354

In the
Supreme Court of the United States

APNA GHAR, INC.,

Petitioner,

v.

ROBERT JOHNSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APNA GHAR, INC.'S PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTH CIRCUIT COURT OF APPEALS

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20 pp

QUESTION PRESENTED

Whether Congress has the authority to regulate the intrastate employment activities of a local, non-commercial, not-for-profit social services shelter under the Commerce Clause?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2 Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Apna Ghar, Inc.'s (Apna Ghar), petition for a writ of certiorari.[1] Written consent for amicus participation in this case was granted by counsel of record for all parties. Letters of consent have been filed with the Clerk of this Court.

PLF is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. In support of these fundamental principles of liberty, PLF litigates in state and federal courts across the nation.

PLF has participated in numerous cases concerning the scope of the Commerce Clause and federalism, including *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*); *United States v. Morrison*, 529 U.S. 598 (2000); *Reno v. Condon*, 528 U.S. 141 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997); and *United States v. Lopez*, 514 U.S. 549 (1995). PLF will augment the arguments of Petitioner by discussing the extent of Congress' authority under the Commerce Clause to regulate wholly intrastate activities with indirect connections to, and no substantial effect on, interstate commerce. The decision below presents this Court with one instance of a wider and dangerous trend among the federal circuits: refusal to enforce the Constitution's textual and structural limits on federal power to the detriment of

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[1] Pursuant to Supreme Court Rule 37.6, PLF affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Americans' liberty. Thus, PLF respectfully urges this Court to grant certiorari.

STATEMENT OF THE CASE

In 1989, five compassionate and enterprising women founded a walk-in shelter to serve the needs of South Asian immigrant women in Chicago's Uptown neighborhood. *Johnson v. Apna Ghar, Inc.*, 330 F.3d 999, 1000 (7th Cir. 2003). Responding to a high incidence of domestic violence and child abuse and neglect in their community, these women created Apna Ghar, Inc., to provide a shelter and social services to women reluctant or unable to avail themselves of the services of other shelters because of language and cultural barriers. *Id.*

Incorporated in Illinois as a charitable institution, Apna Ghar is exempt from federal and state taxes. Brief of Appellee (No. 01-2015) at 1-2, *Johnson v. Apna Ghar, Inc.*, 330 F.3d 999. It maintains and provides services only in Illinois; is not a commercial enterprise; places no products into interstate commerce and does not charge fees for its services. *Id.* Apna Ghar employs legal advocates to assist women with various law-related matters. *Johnson*, 330 F.3d at 1000. When it needed a new legal advocate, Apna Ghar placed an ad in the *Chicago Reader*, a free weekly newspaper distributed in the Chicagoland area. *Id.* at 1000-01.

Mr. Johnson applied for the position. *Id.* However, Apna Ghar did not interview him because it believed a woman advocate would be more effective with its clientele. *Id.* at 1001. Although Mr. Johnson could have brought a gender discrimination complaint under Illinois law,[2] he chose to file

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[2] Like federal law, Illinois prohibits unlawful discrimination in employment. The Illinois Department of Human Rights serves to investigate alleged discrimination and adjudicate such claims as Mr. Johnson's. *See* 775 Ill. Comp. Stat. 5/1-102; 5/1-103(Q); 5/2-

(continued...)

this action in federal court, alleging a violation of Title VII of the 1964 Civil Rights Act. *Id.*

The district court granted Apna Ghar's motion to dismiss for lack of subject matter jurisdiction. *Johnson v. Apna Ghar, Inc.*, No. 00C7752, 2001 WL 293134 (N.D. Ill. Mar. 23, 2001), *rev'd* 330 F.3d 999 (7th Cir. 2003). Relying on *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the district court held Apna Ghar's employment activity was not subject to federal control because it was not an employer engaged in an industry affecting commerce. *Johnson*, 2001 WL 293134, at *1. The court found Apna Ghar was not engaged in an industry affecting interstate commerce because its primary activity, operating a not-for-profit, domestic violence shelter, was conducted wholly within Illinois' borders. *Id.* In conducting its primary activity, Apna Ghar has incidental contacts with interstate commerce via the internet and telephone, and some of its donors are companies engaged in interstate commerce. *Id.* However, the district court found: "None of those things, either singly or collectively, bring Apna Ghar into the realm of " 'an industry affecting commerce.' " *Id.*

The Seventh Circuit reversed. *Johnson*, 330 F.3d at 1000. Relying on the aggregation doctrine of *Wickard v. Filburn*, 317 U.S. 111 (1942), the Seventh Circuit concluded that even though the effects of Apna Ghar's incidental activities on

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[2] (...continued)
102 (2003). The Illinois Human Rights Commission has exclusive jurisdiction over such claims. 775 Ill. Comp. Stat. 5/8-111(C) (2003). *See Maksimovic v. Tsogalis*, 687 N.E.2d 21, 24 (Ill. 1997). Apna Ghar is clearly an "employer" covered by the Illinois Human Rights Act as it employs more than 15 employees within Illinois for more than 20 calender weeks in a year. *See* 775 Ill. Comp. Stat. 5/2-101(B)(1)(a) (2003); *Johnson v. Apna Ghar, Inc.*, 330 F.3d at 1004. It appears Mr. Johnson had a perfectly viable remedy under state law for Apna Ghar's alleged violations.

interstate commerce were *de minimis*, its intrastate employment activity was subject to federal control because Congress was regulating a general class of activities under Title VII. *Johnson,* 330 F.3d at 1002-03. The court refused to apply *Lopez*'s and *Morrison*'s rule that an activity must have a substantial effect on interstate commerce in order for Congress to have the power to control it. *Id.* Instead, the Seventh Circuit held that in spite of the wholly intrastate nature of Apna Ghar's charitable services, its contacts with interstate commerce incidental to its wholly intrastate, noncommercial activity satisfied *Wickard*'s "low threshold" for federal control under the Commerce Clause. *Id.* at 1004.

SUMMARY OF ARGUMENT

In *Lopez* and *Morrison*, this Court announced in clear language that allowing federal control over wholly intrastate activities with attenuated connections to interstate commerce under the Commerce Clause would convert a limited grant of power to Congress into a general police power. However, lower federal courts continue to sanction applications of federal power to wholly intrastate conduct with attenuated effects on interstate commerce. These lower court decisions stem from the clash between *Lopez*'s and *Morrison*'s holdings and the aggregation doctrine and its associated "class of activities" rule.

On the one hand, *Lopez* and *Morrison* hold the grant of authority to Congress under the Commerce Clause is limited in order protect the liberty-preserving tension between federal and state power. On the other hand, both decisions preserved the aggregation doctrine, which sanctions seemingly *unlimited* federal control over intrastate activities, without regard for federalism. As a result, federal power over "every aspect of human existence," *Lopez*, 514 U.S. at 600 (Thomas, J. concurring), continues nearly unabated.

The Seventh Circuit has applied the aggregation doctrine to approve federal control over wholly intrastate, non-

commercial activity based solely on attenuated, incidental contacts with interstate commerce. By contrast, other federal courts focus on the activity itself, without applying the aggregation doctrine, to find federal control under the Commerce Clause would be unconstitutional. To resolve the conflict among the federal circuits and with this Court's precedent, this Court should grant the writ.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT CERTIORARI TO PLACE DEFINITIVE LIMITS ON THE USE OF AGGREGATION DOCTRINE TO UPHOLD FEDERAL CONTROL OVER WHOLLY INTRASTATE, NONCOMMERCIAL CONDUCT

The Commerce Clause grants Congress the power to regulate "commerce with foreign nations, and among the several states, and with the Indian tribes" in order to preserve the free flow of manufactured goods and other products between the states.[3] U.S. Const. art. I, § 8, cl. 3; The Federalist, No. 42 (James Madison) (Clinton Rossiter ed. 1961) at 267. In this case, the Seventh Circuit found Apna Ghar's wholly intrastate activities subject to federal control based on the most attenuated connections to interstate commerce. The court reasoned that Title VII represents a "general regulatory statute"

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[3] *See Lopez*, 514 U.S. at 590-93 (Thomas, J. concurring) (analyzing historical sources to conclude the Commerce Clause did not grant Congress the power over activities that "substantially affected" commerce); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003) (examining over 1600 appearances of the word "commerce" in the *Pennsylvania Gazette* from 1731-1800 and concluding the word was used almost constantly to refer to "trade or exchange" and routinely distinguished from intrastate activities like agriculture and manufacturing).

that bears a substantial relation to interstate commerce, and that therefore the "de minimis" nature of Apna Ghar's conduct did not matter. *Johnson*, 330 F.3d at 1003. In finding Apna Ghar's wholly intrastate conduct was within Congress' authority under the Commerce Clause, the court focused on activities incidental to Apna Ghar's primary activity—providing charitable services to abused women wholly within Illinois' borders[4]. *Id.* at 1004.

The Seventh Circuit found these incidental contacts, despite their *de minimis* effect on interstate commerce, were sufficient for federal control under the Commerce Clause. *Id.* The court did not explain how any or all of these contacts of Apna Ghar exerted any effect on interstate commerce. *Id.* It merely inferred that these incidental contacts were matters "affecting commerce" and (citing *Wickard v. Filburn*, 317 U.S. 111), without discussion, found the aggregation doctrine and the class of activities rule applicable. *Johnson*, 330 F.3d at 1004. The court found the "'affects commerce' hurdle is very low" and that Apna Ghar's incidental contacts with interstate commerce sufficed to confer federal jurisdiction.

Basing federal jurisdiction on such indirect and remote contacts with interstate commerce pushes the authority of the federal government "to such an extreme as to destroy the distinction, which the Commerce Clause itself establishes, between commerce 'among the several states' and the internal concerns of a state." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30; 41 (1937). Over 60 years ago, this Court held in *Wickard* that Congress can constitutionally regulate any activity under the Commerce Clause where, despite its wholly

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[4] The laundry list of routine activities incidental to Apna Ghar's primary activity cited by the Seventh Circuit in support of its holding was: telephone calls and contacts with out-of-state sources; purchases of goods that moved at one time in interstate commerce; occasional out-of-state advertising and solicitation of support. *Johnson*, 330 F.3d at 1004.

intrastate character and attenuated effect when taken separately, "taken together with that of many others similarly situated" such activity can be said to exert an effect on interstate commerce. *Wickard*, 317 U.S. at 128-29. This principle of looking at a "class of activities as a whole" instead of at the activity itself provides no stopping point for the aggregation doctrine because it allows Congress to exercise unlimited power over any activity, no matter its commercial character, intrastate nature or direct effect on interstate commerce. *Lopez*, 514 U.S. at 600-01 (Thomas, J. concurring).[5] Indeed, the heart of the aggregation doctrine is that Congress can regulate because of the effects a wholly intrastate activity may inferentially exert on interstate commerce. *Wickard*, 317 U.S. at 128-29.

Morrison and *Lopez* refused to authorize federal control over intrastate activities under the Commerce Clause based on chains of inferences leading eventually to an effect on interstate commerce. *Morrison*, 529 U.S. at 614-17; *Lopez*, 514 U.S. at 567-68. Unfortunately, this Court did not define the limits of the aggregation doctrine and its "class of activities" or "regulation in general" rationale. *Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 560-61. The lack of definitive limits on the aggregation doctrine allowed the Seventh Circuit and, as discussed below, other federal circuits to circumvent *Lopez*'s and *Morrison*'s strong holding that the Commerce Clause is not a plenary grant of power to Congress to control any intrastate activity it chooses so long as Congress can "aggregate" it with similar activities in other states to posit an "effect" on interstate

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[5] *See, e.g., Scarborough v. United States*, 431 U.S. 563 (1977) (upholding federal felon-in-possession of a firearm statute based solely on the fact that the gun possessed moved at some distant time in the past in interstate commerce).

commerce.[6] This conflict provides ample reason for the Court to grant certiorari in this case.

II

THIS COURT SHOULD GRANT THE WRIT TO RESOLVE THE CONFUSION AND CONFLICTS AMONG THE FEDERAL CIRCUITS GENERATED BY THE CLASH BETWEEN THE AGGREGATION DOCTRINE AND THE LIMITED SCOPE OF THE COMMERCE CLAUSE

The lack of definitive boundaries for federal control of wholly intrastate activities under the Commerce Clause has lead to disarray among the federal circuits. Some courts apply the aggregation doctrine to wholly intrastate activities in an expansive manner, contrary to *Lopez* and *Morrison*. In other cases, courts faced with nearly identical facts reach directly conflicting results because of the discord between the finite power granted under the Commerce Clause and the infinite control the aggregation doctrine authorizes. *Cf. Lopez*, 514 U.S. at 567-68; *id.* at 599-601 (Thomas, J. concurring).

Recently, the Fifth Circuit dismissed *Lopez*'s and *Morrison*'s teaching that Congress' Commerce Clause power must have definite limits in order to prevent federal overreaching into wholly intrastate, noncommercial activities. In *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003) (petition for rehearing pending), the Fifth Circuit found federal control of tiny, cave-dwelling spiders and beetles appropriate under the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, even though they existed only in Texas, had no commercial value, were subject to no trade and therefore

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[6] *See* Arthur B. Mark, III, United States v. Morrison, *The Commerce Clause and the Substantial Effects Test: No Substantial Limit on Federal Power,* 34 Creighton L. Rev. 675, 730-38 (2001) (analyzing how *Morrison* preserved the aggregation doctrine while at the same time finding the Commerce Clause granted Congress limited power).

exerted a negligible effect on interstate commerce. *GDF*, 326 F.3d at 637-38. Indeed, without showing that any economic effect whatsoever could result from a "take" of the listed species, the Fifth Circuit found *Wickard*'s aggregation doctrine applicable. *Id.* at 638-41.

The Fifth Circuit explicitly relied on the aggregation doctrine preserved in *Lopez* and *Morrison* to find that the aggregate nationwide effects of an activity that "took" any endangered species justified federal control over those activities. *Id.* at 630-32, 641. Such a broad use of the aggregation doctrine resembles the "costs of crime" argument rejected by this Court in both *Lopez* and *Morrison*.[7] *Lopez*, 514 U.S. at 564-68; *Morrison*, 529 U.S. at 614-19. Such an unwarranted extension of *Wickard* fails to respect both the Constitution and this Court's holdings that the Commerce Clause does not grant to Congress a general police power. *Cf. Morrison*, 529 U.S. at 617-19; *Lopez*, 514 U.S. at 567-68.

The need for definitive boundaries on the scope of the commerce power is also apparent in recent circuit court decisions regarding federal criminal laws. In *United States v. Holston*, the Second Circuit considered whether 18 U.S.C. § 2251(a) was an unconstitutional use of the commerce power, where the government's case depended solely on the fact that the defendant produced child pornography using "materials that [had] been mailed, shipped, or transported in interstate or foreign commerce by any means. . . ." No. 02-1292, 2003 WL

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[7] The "costs of crime" argument relies on a ripple-effect logic. In both *Lopez* and *Morrison*, the government argued that under the aggregation doctrine, Congress could regulate gun possession in schools and gender-motivated violence, respectively, because of the aggregate effects of those crimes on the national economy. *Lopez*, 514 U.S. at 564-65; *Morrison*, 529 U.S. at 612-14. This Court rejected such a broad use of the aggregation doctrine in both cases in order to preserve the line between what is "truly national and truly local." *Lopez*, 514 U.S. at 566-68; *Morrison*, 529 U.S. at 617-19.

22053060, at *2 (2d Cir. Sept. 4, 2003). Holston had recorded sexually explicit images of 10- and 14-year-old girls using equipment that had once moved in interstate commerce. *Id.* at *1.

The Second Circuit found that despite the wholly intrastate nature of Holston's acts, Congress could regulate because possession or production of child pornography in the aggregate substantially affected interstate commerce. *Id.* at *6. The court found that Holston's "homegrown" pornography was the equivalent of the homegrown and consumed wheat in *Wickard*. *Id.* Like Wickard's wheat, Holston's pictures threatened to enter the market and theoretically affect the supply and demand for child pornography. *Id.* *See Wickard*, 317 U.S. at 128 ("[W]heat overhangs the market and if induced by rising prices tends to flow into the market and check price increases"). Further, the *de minimis* effects of Holston's acts alone on interstate commerce did not bar his prosecution for lack of an interstate commerce connection because the statute regulated a general class of activities that Congress concluded substantially affects interstate commerce. *Holston*, 2003 WL 22053060, at *6.

By contrast, in *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003), the Ninth Circuit dismissed an indictment under the federal child pornography statute, 18 U.S.C. § 2252(a)(4)(B). *Id.* 323 F.3d at 1133. The court refused to apply the aggregate effects test to the intrastate possession of child pornography that the Second Circuit applied in *Holston*. *Id.* at 1120-23. Instead, the Ninth Circuit focused solely on the effect the conduct of the defendant exerted on interstate commerce. *Id.* Focusing on the activity of the defendant, and not the general, nationwide effects of a "class" of crime, the Ninth Circuit held the federal government could not constitutionally control McCoy's intrastate possession of visual depictions of children in sexually suggestive poses. The court found McCoy created the images intrastate; did not receive the images in

interstate commerce; and did not intend to sell, distribute or exchange them. *Id.* at 1129-30. Further, the use of camera and film that had previously been shipped in interstate commerce was not enough, by itself, to demonstrate any effect on interstate commerce. *Id.* at 1125-26.

The Ninth Circuit applied *Lopez* and *Morrison* to find that McCoy's conduct itself was too attenuated from interstate commerce to justify federal control. *Id.* at 1129. This decision is in conflict with *Holston*, which found federal control of a wholly intrastate crime proper based on a "'general regulatory statute.'" *Holston*, 2003 WL 22053060, at *6. The fact the Second and Ninth Circuits could reach contradictory conclusions applying *Lopez* and *Morrison* to similar fact patterns demonstrates the need for this Court to resolve the continuing conflict between the aggregate effects/class of activities doctrine and the limited grant of power conferred on Congress under the Commerce Clause.

Another pair of circuit decisions reached opposing conclusions regarding an intrastate activity's effect on commerce under the federal arson statute, 18 U.S.C. § 844(i). In *United States v. Lamont*, 330 F.3d 1249 (9th Cir. 2003), the Ninth Circuit found a church's effects on interstate commerce were not substantial and therefore the federal arson statute could not apply. *Id.* at 1259. Although the church had members from five states; received utility and insurance services from out-of-state providers; received donations from out-of-state residents; purchased goods from out-of-state; and received and distributed publications out-of-state, these contacts were too attenuated from interstate commerce for Lamont's arson of a church to exert a substantial effect. *Id.* at 1253-57.[8]

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[8] *Cf. Jones v. United States*, 529 U.S. 848, 857-60 (2000) (limiting reach of federal arson statute to avoid addressing whether statute violated the Commerce Clause); *United States v. Ballinger*, 312 F.3d

(continued...)

The Ninth Circuit cited *Morrison*'s command that the courts maintain the limited scope of the Commerce Clause in order to prevent the federal government from exercising a general police power over Americans as one of the reasons for its decision. *Id.* at 1252.

By contrast, in *United States v. Rayborn*, 312 F.3d 229 (6th Cir. 2002), the Sixth Circuit found a church's effects on interstate commerce were substantial and therefore the federal arson statute applied. *Id.* at 235-36. The court avoided applying the constitutional analysis called for by *Lopez* and *Morrison* to determine whether an activity has a substantial effect on interstate commerce. *Id.* at 232-36. Instead, it found the church had a substantial effect on interstate commerce because its congregation traveled from three nearby states to attend services; it received donations from out-of-state contributors; and it purchased goods that had once traveled in interstate commerce for picnics and church services such as funerals. *Id.* at 234-36.

Legal scholars recognize lower federal courts continue to use the aggregation to uphold federal control over wholly intrastate activities with minimal or attenuated connections to interstate commerce.[9] Post-*Lopez* and post-*Morrison* decisions of the federal courts reflect a determined resistance to

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[8] (...continued)
1264 (11th Cir. 2002) (holding that 18 U.S.C. § 247 could not apply to five church burnings that all occurred in Georgia, either separately or in the aggregate because each church's connections to interstate commerce were too attenuated).

[9] Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 Ark. L. Rev. 731 (2003) (arguing that *Lopez* and *Morrison* will not seriously effect the current, extensive reach of federal power because the Court did not limit the aggregation doctrine and other devices for extending federal power over wholly intrastate activities).

respecting the limited grant of federal power under the Commerce Clause by purposely under reading *Lopez* and *Morrison*.[10] Further, the lack of definitive boundaries to the scope of the Commerce Clause power allows courts to uphold continued federal control of intrastate, noncommercial activity with tenuous links to interstate commerce.[11] Unless this Court resolves the clash between the aggregation doctrine and the limited grant of power explicit in the Commerce Clause, it will continue to generate disarray among the federal circuits. Thus, this Court should grant the writ.

CONCLUSION

In *Lopez* and *Morrison*, this Court held the Commerce Clause granted Congress only limited power in order to prevent the federal government from exercising a general police power. However, that directive conflicts with this Court's continued approval of the aggregation doctrine. Some lower federal courts continue to use the aggregation doctrine to extend federal control over any activity regardless of its intrastate or commercial character or the degree of its effect on interstate commerce. Others have rejected the aggregation doctrine, finding to apply it would destroy the "distinction between what

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[10] Glenn H. Reynolds & Brannon P. Denning, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 Ark. L. Rev. 1253 (2003) (analyzing what effect *Morrison* had on lower court's willingness to strike down federal laws or their application on Commerce Clause grounds); *Lower Court Readings of* Lopez, *Or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 Wis. L. Rev. 369 (surveying lower court applications of *Lopez*).

[11] Kathleen Brickey, *Crime Control and the Commerce Clause: Life After* Lopez, 46 Case W. Res. L. Rev. 80 (1996) (noting *Lopez* left intact precedents that allow federal control of wholly intrastate crimes with tenuous links to interstate commerce).

is truly national and what is truly local" the Commerce Clause seeks to preserve. *Lopez*, 514 U.S. at 567-68.

As James Madison wrote, and as this Court recently reaffirmed, the " 'powers delegated by the . . . Constitution to the federal government are few and defined.' " *Lopez*, 514 U.S. at 552 (quoting The Federalist, No. 45 at 292-93). States possessed control over all else not expressly ceded to federal control. *Lopez*, 514 U.S. at 553. The Framers' purpose in dividing power between federal and state governments was to maximize liberty by preventing extensive central control over the lives of Americans. *Id.* The continued preservation of the aggregation doctrine subverts this purpose, as demonstrated by the addled application of the aggregation doctrine among the federal circuits. *Cf. id.* at 599-601 (Thomas, J. concurring). Thus, this Court should grant Apna Ghar's petition for a writ of certiorari, to resolve conflict and confusion among the lower federal courts and to preserve the "promise of liberty" explicit in the Constitution's division of power among the federal government and the states.

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